United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6104

To be argued by
JOHN M. O'CONNOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6104

CHARLES BROWNSELL and CAZILIE BROWNSELL,
Plaintiffs-Appellants,

—v.—

ARCHIE DAVIDSON and JOAN BOYD,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

ROBERT B. FISKE, JR.,
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JOHN M. O'CONNOR,
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Issues Presented

1. Was the District Court correct in deciding that where an employee alleges that his superiors have taken adverse personnel action against him because of his union activities, the employee's claim is "arguably subject" to the exclusive jurisdiction of the National Labor Relations Board, and therefore the complaint should be dismissed for lack of subject matter jurisdiction.

2. Does an accord and satisfaction reached between the plaintiff-employee and the employer, United States Postal Service, bar a subsequent action by the employee, based on the same underlying events, against the individual supervisors whose conduct is complained of.

3. Are the defendants Davidson and Boyd, who are respectively the Postmaster and the Supervisor of Mails

at the New City, New York, Post Office, immune from civil liability for personnel actions alleged to have been "mailicious" and "retaliatory" in nature.

Statement of the Case

The plaintiffs-appellants appeal from a judgment of the United States District Court for the Southern District of New York (MacMahon, J.), entered May 10, 1976, which granted the defendants-appellees motion pursuant to Rule 12(c) for judgment on the pleadings, and dismissed the complaint on the ground that the allegations of the complaint were essentially claims of unfair labor practices over which the National Labor Relations Board has exclusive jurisdiction. Having dismissed the complaint on the ground of lack of jurisdiction, the District Court did not reach the issues of accord and satisfaction or the immunity of the defendants as government officials. The endorsed memorandum decision stated in its entirety as follows:

> Defendants move, pursuant to Rule 12(c), Fed. R. Civ. P., for judgment on the pleadings dismissing the complaint on the ground that this court lacks jurisdiction.
>
> The complaint alleges that defendants, the Postmaster of New City, New York and the Supervisor of Mails and delivery at the New City Post Office, failed to process claims by plaintiff, Charles Brownsell, relating to on-the-job injuries and laid him off between October 6, 1972 and September 29, 1975 in retaliation for his activities as a representative of Branch 5229, National Association of Letter Carriers. These allegations are essentially claims of unfair labor practices under Section 8(a) of the National Labor Relations Act, 29 U.S.C.

§ 158(a). The National Labor Relations Board has excluhive jurisdiction over claims arguably subject to the Act. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959).

Accordingly, defendants' motion for judgment on the pleadings dismissing the complaint is granted.

So ordered. p. 29a.*

Statement of the Facts

The defendant-appellee Archie Davidson ("Davidson") is the Postmaster of the New City, New York, Post Office. The defendant-appellee Joan Boyd, now named Joan Hoyt, ("Boyd") is the Supervisor of Mails and Delivery at the New City, New York, Post Office. The plaintiff-appellant Charles Brownsell is a letter carrier at the New City Post Office. The plaintiff-appellant Cazilie Brownsell is his wife. Prior to October, 1972, Charles Brownsell ("plaintiff") was allegedly injured on the job and was allegedly unable to completely perform the duties of his route. Following a period of time in which plaintiff worked less than a full day, the defendant Davidson instructed Brownsell, on October 6, 1976, not to return to work until he was capable of performing completely the duties of his route. p. 8a, 15a. Plaintiff contends that this action was taken maliciously in an attempt to discourage him from his activities as a union official. p. 9a. The defendants contend that this action was taken for administrative reasons, since plaintiff's partial work day frequently created the need for overtime pay to other employees, and that no personal

* "a" refers to the appendix on appeal, which is paginated at the top of each page.

vindictiveness was involved. Memorandum of Law in Support of Motion for Judgment on the Pleadings. p. 2.

Plaintiff also claims that Davidson and Boyd "failed, refused and neglected" to process official claim forms relating to on-the-job injuries. However, while complaining of delay, plaintiff does admit that his claims were actually processed and that he has received the appropriate benefits. Appellant's Brief, p. 3.

The plaintiff filed a "Charge Against Employer" with the National Labor Relations Board on April 4, 1973. The "Basis of the Charge" was stated as follows:

> Since on or about October 6, 1972, the above named employer [United States Postal Service], by its officers, agents, servants and employees, has discriminated against CHARLES E. BROWNSELL, its employee, with regard to the terms and conditions of his employment, solely because of his concerted activities on behalf of Branch 5229, National Association of Letter Carriers, in violation of the Act.
>
> By these and other acts, the above named employer, by its officers, agents, servants, and employers, has interfered with, restrained and coerced the said CHARLES E. BROWNSELL, and other employees, in the exercise of their rights guaranteed under the Act. Exhibit A to Defendants Memorandum in support of Judgment on the Pleadings; see p. 18a-20a.

The plaintiff filed a second charge on July 24, 1973, whose basis was as follows.

> Since or about July 17, 1973, the above named employer [United States Postal Service] by its

> officers, agents, servants and employees, has discriminated against CHARLES E. BROWNSELL, its employee, with regard to his terms and conditions of employment, particularly the failure to reinstate him to light duty, solely because of his concerted activities on behalf of the National Association of Letter Carriers, in violation of the Act. Exhibit B to Defendants Memorandum of Law in Support of Motion for Judgment on the Pleadings; see p. 18a-20a.

The above charges were resolved by a settlement agreement signed by the plaintiff on September 22, 1975 and approved by the National Labor Relations Board September 23, 1975. p. 21a-24a. By the terms of the settlement agreement the plaintiff received an award of $5,000, credits of annual and sick leave, reinstatement as a letter carrier, and the waiver by the Postal Service of any claim of offset of disability payments received by the plaintiff. Plaintiff does not deny that this settlement has been satisfied, but rather contends that the accord and satisfaction with the United States Postal Service does not bar suit against Brownsell and Davidson as individuals. App. Br., p. 9-10.

Plaintiff commenced this action in the Supreme Court of the State of New York on October 5, 1975 and it was subsequently removed to the Southern District of New York.

ARGUMENT

POINT I

The National Labor Relations Board has exclusive jurisdiction over the claims asserted in the complaint; neither the state nor the federal courts have subject matter jurisdiction and the District Court properly dismissed the complaint.

The plaintiff, an employee of the United States Postal Service, complains that certain actions were taken against him by the defendants Davidson and Boyd

> "solely based upon and in retaliation for the exercise by the plaintiff CHARLES BROWNSELL of his representative activities and grievance representation in the negotiation of various collective bargaining unit members, under obligations in existence between the New City, New York Post Office and Branch 5229 of the National Association of Letter Carrers." Complaint, paragraph 9, p. 9a.

Under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), it is an unfair labor practice for an employer

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the NLRA];
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

By the express terms of the statute, union organization and union activity are rights guaranteed by section 7 of the NLRA, 28 U.S.C. § 157, and it is well recognized that an employer's action to punish an employee for union activity is inherently discriminatory within section 8(a)(3), 28 U.S.C. § 158(a)(3). *E.g.*, *N.L.R.B.* v. *Great Atlantic & Pacific Tea Company*, 340 F.2d 690 (2d Cir. 1965).

Under Supreme Court holdings, it is also a settled principle of law that, 'When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). This conclusion is not altered by the fact that judicial intervention is invoked in order to obtain damages, whether or not the Board has the power to grant the damages sought.

> Nor is it significant that California asserted its powers to give damages rather than to enjoin what the Board may restrain though it could not compensate.
>
> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. *Id.* at 246-247.

In the present case, the plaintiff's claims are clearly "arguably subject" to sections 7 or 8 of the Act, since, if proved, the allegations would be held an unfair labor practice under the numerous judicial holdings on the point.

On appeal plaintiff attempts to circumvent the simple and obvious theorems set out above by contending that the purpose of the National abor Relations Act involves public policy questions, while his claim is a private wrong, a *prima facie* tort. However, as the above quote from *Garmon* illustrates, the award of damages for a "private" wrong is no less a trespess on the jurisdiction of the NLRB than the granting of an injunction. To illustrate, assume that plaintiff had not settled his claims before the NLRB but had pursued them to conclusion. The NLRB might have found that the United States Postal Service and its agents Davidson and Boyd, had acted entirely properly in taking the personnel action against plaintiff. A court's contrary finding, and award of damages in a tort action, would surely encroach upon the exclusive jurisdiction of the NLRB to decide the appropriateness of actions taken in a labor relations setting. Conversely, if an employer charges a labor organization with an unfair labor practice and loses before the NLRB, may the employer then go to state court and receive an award of damages, arguing intentional interference with business relations, based upon the very same allegation that was rejected by the NLRB? To allow such decisions to stand would lead to the very result the Supreme Court has so scrupulously avoided, the rapid balkanization of labor relations law and practice. Whether christened "prima facie tort" or the more familiar "unfair labor practice," in the present case the underlying events are the same, and it is surely "arguable" at the very least, that the claims presented are subject to the National Labor Relations Act. And where the "arguably subject" test is met, the NLRB has exclusive jurisdiction.

Accordingly, both the federal and State courts are without jurisdiction over the claims asserted in the complaint and the complaint must be dismissed.

POINT II

Plaintiff has settled whatever claims he possessed based on the facts alleged, and the satisfaction of that settlement is a bar to the present action.

The plaintiff Charles Brownsell filed two charges against the United States Postal Service with the National Labor Relations Board based upon the same underlying facts presented in the complaint in the present action. The charges were consolidated into a single complaint in the National Labor Relations Board proceedings. p. 18a-20a. Paragraph 6(2) of the consolidated complaint charges the failure to process the claim forms relating to on-the-job injury, and paragraph 6(b) charges that Brownsell was "laid off" on October 6, 1972.

The plaintiff settled his claims based on these events by entering into an agreement with the United States Postal Service on September 22, 1975. p. 21a-24a. The United States Postal Service, the employer of the defendants in this action, has satisfied the terms of this settlement by paying to the plaintiff $5,000 and crediting him with annual and sick leave, etc.

It is an elementary principle of law that such an executed agreement constitutes an accord and satisfaction (or compromise and settlement) that "is an absolute and complete defense to an action on the original claim or demand . . ." 1 C.J.S. Accord and Satisfaction, § 45, p. 549; *Cf. Intercontinental Communications Constr. Corp.*

v. *Fox*, 380 F.2d 214 (7th Cir. 1967). Since the accord and satisfaction was with the United States Postal Service, the employer and principal of the defendants, who are agents and officials of the Postal Service, it also operates to prevent the assertion of any claim against Davidson and Boyd based upon the same underlying facts. 1 C.J.S. Accord and Satisfaction, § 46; *Cf. Cox* v. *City of Freeman*, 321 F.2d 887 (8th Cir. 1963).

More important, this result is specifically dictated by statute when the employer is an agency of the United States.* Section 2672 of Title 28 U.S.C. grants the head of each federal agency or his designee the authorization to compromise appropriate claims against the United States in amounts of $25,000 or less. The last paragraph of this section provides as follows:

> The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States *and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.* 28 U.S.C. § 2672 (Emphasis added).

From this section it is quite clear that plaintiff's argument that the settlement with the Postal Service does not affect the plaintiffs' rights against the individual defendants, because they were not parties to the NLRB proceedings, is totally without merit. Neither section 2672, which applies to compromises and settlements, nor

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* The United States Postal Service is an agency of the United States in this context. *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975).

the analagous section 2676, which applies to judgments against the United States, requires that the employees be connected in any formal way with the compromise or judgment against the United States.

Accordingly, the complaint should be dismissed since it is based upon claims which have already been settled and for which the plaintiff has received satisfaction.

POINT III

The defendants were acting within the scope of their employment as officials of the United States and therefore are entitled to immunity from civil liability.

Between the filing and the argument of the defendants' motion for judgment on the pleadings, this Court decided *Economou* v. *United States Department of Agriculture*, 535 F.2d 688 (2d Cir. 1976; April 23, 1976), holding that the immunity for government officials of the executive branch is a qualified, and not an absolute immunity. Although the defendants' maintain that they acted in good faith and upon reasonable grounds, the record was not developed for the qualified immunity dectrine set out in the *Economou* decision. In light of the *Economou* decision, the defendants do not advance, on the present record, the argument that the complaint should be dismissed on the grounds of immunity.

CONCLUSION

The judgment of the district court dismissing the complaint should be affirmed.

Dated: New York, New York
October 6, 1976

Respectfully submitted,

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State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of October, 19 76 s he served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Richard W. Rosen, Esq.,
120 North Main St.
NY NY 10956

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

7th day of October, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977